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10 UNITED STATES DISTRICT COURT

11 SOUTHERN DISTRICT OF CALIFORNIA

12 In re Incretin-Based Therapies  
13 Products Liability Litigation

Case No. 3:13-md-02452 AJB-MDD

MDL 2452

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*This Document Relates to All Cases*

**Plaintiffs' Steering Committee's  
Memorandum of Points and  
Authorities in Support of Motion  
for an Order Securing Equitable  
Allocation of Attorney Fees and  
Costs for MDL Administration and  
Common Benefit Work**

No hearing per request of Chambers

Courtroom: 3B

Judge: Hon. Anthony J.  
Battaglia

Magistrate: Hon. Mitchell D.  
Demin

1           **I.       PROCEDURAL HISTORY AND STATEMENT OF THE FACTS**

2           This multidistrict litigation involves approximately 583 individual personal  
3 injury and wrongful death lawsuits brought by or on behalf of those who now  
4 suffer from pancreatic cancer a result of being administered one of defendants'  
5 incretin mimetic class of drugs.

6           To date, there are four incretin mimetic drugs included in this MDL. These  
7 four drugs are or were manufactured and marketed by four manufacturers, all of  
8 whom are named as a defendant in at least one action pending in this MDL. Byetta  
9 is and was manufactured by Amylin Pharmaceuticals, LLC and Eli Lilly And  
10 Company and was approved by the FDA in April of 2005. Januvia and Janumet are  
11 manufactured by Merck Sharp & Dohme Corp. and were approved by the FDA in  
12 October of 2006, and March of 2007, respectively. Victoza is manufactured by  
13 Novo Nordisk, Inc. and was approved by the FDA in January of 2010.

14           On August 26, 2013, the Judicial Panel for Multidistrict Litigation entered  
15 an Order transferring all federal cases involving these incretin mimetic class drugs  
16 to the Southern District of California for coordinated discovery and consolidated  
17 pretrial proceedings pursuant to 28 U.S.C. § 1407.

18           On October 21, 2013, this Court, as the transferee court, entered an Order  
19 Appointing a Plaintiffs' Steering Committee, which created the Plaintiffs' Steering  
20 Committee ("PSC") consisting of 3 Co-Leads; 4 Executive Committee members; 2  
21 Co-Liaison Counsel; 13 PSC members; and 1 state & federal liaison. *See* Doc. 29.  
22 The Court set forth certain duties and responsibilities of the PSC. Doc. 29 at 2-3.

23           Since the entry of Doc. 29, the PSC has set up the plaintiffs' document  
24 depository, engaged in extensive pretrial discovery, and extensive motion practice.  
25 From its inception, the PSC has represented the plaintiffs at the Court's status  
26 conferences and has begun the trying task of managing this complex litigation,  
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1 including, but not limited to, the time-consuming process of document review.

2 In the next several months, the PSC plans to continue the review of the  
3 millions of pages of documents produced by the defendants, to continue taking the  
4 depositions of all the key witnesses including employees and agents of the  
5 defendants, and to conduct third party discovery. In addition, the PSC will produce  
6 experts who will provide “generic” reports and expert testimony so that the early  
7 bellwether trials can proceed.

8 The purpose of this motion is to seek an Order creating a “fund” consisting  
9 of the recoveries in the federal court cases, and in coordinating state cases, from  
10 which the PSC and other attorneys performing “common benefit work” for  
11 plaintiffs may obtain compensation for the benefits which they confer on plaintiffs  
12 and to provide a mechanism to protect against the misappropriation of the work  
13 product created by the PSC.

14 For the reasons which follow, the PSC respectfully submits that such relief is  
15 appropriate.

## 16 II. ARGUMENT

### 17 18 **A. Securing an Equitable Allocation of Fees and Costs for the PSC and the** 19 **Attorneys it Designates to Administer the MDL Docket and Perform** 20 **Common Benefit Work is Necessary and Appropriate at This Time**

21 The common fund doctrine is a principle of equity designed to prevent  
22 unjust enrichment by providing that “a litigant or a lawyer who recovers a common  
23 fund for the benefit of persons other than himself or his client is entitled to a  
24 reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*,  
25 444 U.S. 472, 478 (1980); *see also Sprague v. Ticonic National Bank*, 307 U.S.  
26 161, 166 (1939); *Trustees v. Greenough*, 105 U.S. 527, 534-536 (1881); *In re*  
27 *SmithKline Beckman Corp. Securities Litigation*, 751 F. Supp. 525, 530 (E.D. Pa.

1 1990). As the Third Circuit stated in *Lindy Bros. Builders, Inc. Of Philadelphia v.*  
2 *American Radiator & Standard Sanitary Corp.*, 487 F. 2d 161, 165 (3d Cir. 1973):

3 These equitable powers, may, under the equitable fund doctrine, be  
4 used to compensate individuals whose actions in commencing,  
5 pursuing or settling litigation, even if taken solely in their own name  
6 and for their own interest, benefit a class of persons not participating  
7 in the litigation. *See Sprague v. Ticonic National Bank*, 307 U.S. 161,  
8 59 S. Ct. 777, 83 L.Ed. 1184 (1939).

9 The award of fees under the equitable fund doctrine is analogous to an action  
10 in quantum meruit: the individual seeking compensation has, by his actions,  
11 benefitted another and seeks payment for the value of the service performed. *See*  
12 *also Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.  
13 1974); *Strong v. Bell South Telecommunications, Inc.*, 137 F.3d 844, 850 (5th Cir.  
14 1998).

15 In order for the common fund doctrine to apply, the beneficiaries of the fund  
16 need not be members of a class and the benefit need not have been conferred in the  
17 context of a class action because the common fund principle is a long-standing  
18 principle of equity which predates modern class actions. *See Trustees v.*  
19 *Greenough*, 105 U.S. 527 (1881). As the court stated in *Vincent v. Hughes Air*  
20 *West, Inc.*, 557 F.2d 759 (9th Cir. 1977):

21 The common fund doctrine provides that a private plaintiff, or his  
22 attorney, whose efforts create, discover, increase or preserve a fund  
23 to which others also have a claim is entitled to recover from the fund  
24 the costs of his litigation, including attorneys' fees. The doctrine is  
25 "employed to realize the broadly defined purpose of recapturing  
26 unjust enrichment." *I Dawson* 1597. That is, the doctrine is designed  
27 to spread litigation costs proportionately among all the beneficiaries  
28 so that the active beneficiary does not bear the entire burden alone  
and the "stranger" beneficiaries do not receive their benefits at no  
cost to themselves. *Id.* At 769.

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2       *See also In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006 (5th  
3 Cir. 1977) (court awarded fees to lead counsel by ordering each other attorney  
4 representing a plaintiff to pay to lead counsel part of his fee from his client); *City*  
5 *of Klawock v. Gustafson*, 585 F.2d 428, 431 (9<sup>th</sup> Cir. 1978) (court held that  
6 attorneys whose litigation efforts benefitted their client as well as other native  
7 towns may be entitled to attorneys’ fees under the common benefit theory); *In re*  
8 *MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522 (D. Nev. 1987) (court  
9 awarded legal committee seven percent of gross recovery of “global settlement”  
10 funds to reasonably compensate committee for professional labors and for bearing  
11 considerable long-standing risks).

12       Apart from application of the common fund doctrine as an equitable  
13 principle governing the payment of counsel fees and litigation expenses, it has  
14 consistently been recognized that federal courts possess the inherent power to  
15 appoint counsel to coordinate and manage complex multiparty litigation and to  
16 require that such counsel be paid for discharging these duties out of the proceeds of  
17 the litigation generally. *See, e.g., In re Propulsid Products Liability Litigation*,  
18 MDL No. 1355, PTO No. 16 (E.D.La. Dec. 26, 2001)(set aside of 6% for federal  
19 cases and 4% for coordinating state cases); *In re Rezulin Products Liability*  
20 *Litigation*, MDL No. 1348, PTO No. 67 (S.D.N.Y. March 20, 2002)(set aside of  
21 6% for federal cases and 4% for coordinating state cases); *In re Diet Drugs*  
22 *Products Liability Litigation*, 1999 WL 124414 (E.D.Pa. Feb. 10, 1999)(PTO No.  
23 467)(court set aside 9% of any recovery for cases in MDL to create fund for PMC  
24 members to be compensated)<sup>1</sup>; *In re Orthopedic Bone Screw Products Liability*

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26       <sup>1</sup> PTO No. 467 was later expanded by PTO No. 517 to include litigation in all  
27 coordinating states. Both orders were subsequently modified by PTO No.  
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1 *Litigation*, MDL No. 1014, 1996 WL 900349 (PTO 402) (E.D.Pa. June 17, 1996)  
2 (parties ordered to sequester 12% of recoveries for fees and 5% of recoveries for  
3 costs in order to create fund from which Court-appointed Plaintiffs' Legal  
4 Committee could seek reimbursement for the work performed on behalf of all  
5 plaintiffs); *In re Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel*  
6 *Fire Litigation*, 982 F.2d 603, 606-07 (1st Cir. 1992); *In re Air Crash Disaster at*  
7 *Florida Everglades*, 549 F.2d at 1011-17; *In re MGM Grand Hotel Fire Litigation*,  
8 660 F.Supp. at 522, 524-26.

9 Thus, in mass tort cases involving consolidated MDL proceedings, counsel  
10 who have been appointed by the Court to manage the litigation for the benefit of all  
11 plaintiffs should receive reimbursement for the costs expended in that effort and  
12 compensation for their services from all of the plaintiffs on a ratable basis. *In re*  
13 *Diet Drugs Products Liability Litigation*, *supra*; *In re Orthopedic Bone Screw*  
14 *Products Liability Litigation*, MDL No. 1014; *In re Nineteen Appeals*, 982 F.2d at  
15 606-07; *Smiley v. Sincoff*, 958 F. 2d 498, 501 (2d Cir. 1992); *In re Agent Orange*  
16 *Product Liability Litigation*, 611 F. Supp. 1296, 1317 (E.D.N.Y. 1985); *aff'd in*  
17 *part, rev'd in part*, 818 F.2d 226 (2d Cir. 1987); *In re Air Crash Disaster at*  
18 *Florida Everglades*, 549 F.2d at 1019-21.

19 These principles were articulated in *Nineteen Appeals* as follows:

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21 Under standard American rule practice, each litigant pays his or her own  
22 attorneys' fees. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*,  
23 421 U.S. 240, 245, 95 S. Ct. 1612, 1615, 44 L.Ed.2d 141 (1975). Yet,  
24 there are times when the rule must give way. For example, when a court  
consolidates a large number of cases, stony adherence to the American

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26 2628 to reduce the assessment by 1/3 to 6% for federal cases and 4% for  
27 coordinating state cases.

1 rule invites a serious free-rider problem. *See generally* Mancus Olson,  
2 *The Logic of Collective Action*(1071). If a court hews woodenly to the  
3 American rule under such circumstances, each attorney, rather than  
4 toiling for the common good and bearing the cost alone, will have an  
5 incentive to rely on others to do the needed work, letting those others  
6 bear all the costs of attaining the parties' congruent goals.

7 A court supervising mass disaster litigation may intervene to prevent  
8 or minimize an incipient free-rider problem and to that end, may  
9 employ measures reasonably calculated to avoid "unjust enrichment  
10 of persons who benefit from a lawsuit without shouldering its costs."  
11 *Catullo v. Metzner*, 834 F.2d 1075, 1083 (1st Cir. 1987). Such courts  
12 will most often address the problem by specially compensating those  
13 who work for the collective good, chiefly through invocation of the  
14 so-called common fund doctrine.

15 Here, [the District Court's] decision to use a steering committee [to  
16 manage consolidated mass tort litigation on behalf of all plaintiffs]  
17 created an occasion for departure from the American rule. In apparent  
18 recognition of the free-rider problem, the judge served notice from the  
19 beginning that he would eventually make what he, relying in part on  
20 appellees' counsel, *see Fees Op.*, 768 F. Supp. At 924 n. 42, later termed  
21 a "common fund fee award" to remunerate PSC members for their efforts  
22 on behalf of communal interests. This was a proper exercise of judicial  
23 power. *See Mills v. Electric AutoLite Co.*, 396 U.S. 375, 392, 90 S. Ct.  
24 616, 625, 24 L.Ed.2d. 563 (1970); *see also In re "Agent Orange" Prod.*  
25 *Liab. Litig.*, 818 F.2d 226, 240 (2d Cir. 1987) (upholding a fee award to a  
26 plaintiffs' steering committee under the equitable fund doctrine);  
27 *Bebchick v. Washington Metro. Area Transit Comm'n*, 805 F.2d 396, 402  
28 (D.C. Cir. 1986) (collecting cases); *In re MGM Grand Hotel Fire Litig.*,  
660 F. Supp. 522, 526 (D. Nev. 1987). *In re Nineteen Appeals*, 982 F.2d at  
606-07.

23 In order to protect the right of common benefit attorneys to receive a fee  
24 from the proceeds of the litigation in which they have participated and diligently  
25 worked on behalf of plaintiffs, courts have consistently ruled that it is appropriate  
26 to direct that all or part of the counsel fees which may become payable in each  
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1 action which was the subject of coordinated or consolidated proceedings be  
2 deposited in an escrow account for allocation by the Court in accordance with  
3 appropriate legal standards. *In re Diet Drugs Products Liability Litigation, supra*;  
4 *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire*  
5 *Litigation*, 56 F. 3d 295, 300 (1st Cir. 1995); *Smiley v. Sincoff*, 958 F.2d 498, 499  
6 (2d Cir. 1992); *In re Orthopedic Bone Screw Products Liability Litigation*, MDL  
7 No. 1014, *In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296,  
8 1317 (E.D.N.Y. 1985); *In re Silicone Gel Breast Implant Product Liability*  
9 *Litigation*, MDL 926, Pretrial Order Nos. 13 & 23 (N.D. Ala. July 23, 1993 and  
10 July 28, 1995)(Exhibit "1"). Thus, this Court should properly enter an Order  
11 requiring that some portion of the fees earned in each individual action which is  
12 the subject of these consolidated MDL 2452 proceedings be withheld for  
13 distribution to counsel acting for the benefit of all litigants.

14 A question then remains as to the proportion of plaintiffs' recoveries that  
15 should be subject to such sequestration. Ultimately, the amount of the fee to be  
16 awarded must be determined either under the lodestar approach recognized by the  
17 Fifth Circuit or under the percentage of the fund approach based upon judicial  
18 assessment of the amount and quality of work performed by the common benefit  
19 lawyers in relation to the size of the recoveries which have been generated. *See,*  
20 *e.g., In re Diet Drugs Products Liability Litigation, supra; In re Orthopedic Bone*  
21 *Screw Product Liability Litigation*, MDL 1014, PTO 402 (12% for fees and 5% for  
22 costs sequestered); *Johnson*, 488 F.2d at 717-19; *In re Thirteen Appeals*, 56 F.3d at  
23 304-07; *In re Washington Public Power Supply System Securities Litigation*, 19  
24 F.3d 1291, 1295 (9th Cir. 1994), *aff'd in part*, 19 F.3d 1306 (9th Cir. 1994);  
25 *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993);  
26 *Harman v. Lymphomed, Inc.*, 945 f. 2d 969, 975 (7th Cir. 1991); *Brown v. Phillips*  
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*Petroleum Co.*, 838 F.2d 451, 454 (10th Cir.), *cert. denied*, 488 U.S. 822 (1988).

Because the instant action is ongoing, it is impossible to ascertain the total amount of time that will have been expended by the PSC and associated counsel for the common benefit or to ascertain the amounts which will be generated for the plaintiffs as a whole. Thus, it is impossible to determine the precise percentage of plaintiffs' recoveries which should be subject to an Order requiring payment to the Common Benefit Attorneys under the equitable principles set forth above.

The PSC respectfully requests that the Court immediately enter an order providing for a common benefit fund, attached hereto as Exhibit A.

For all counsel, distribution of any funds sequestered will be pursuant to a subsequent order by the Court in accordance with applicable principles of law governing fee awards.

### III. CONCLUSION

For the foregoing reasons, the PSC requests that its Motion be granted and that the proposed Order, appended hereto as Exhibit A, be entered by the Court.

Dated: August 1, 2014

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Dated: August 1, 2014

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